Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN W. STORRS,

Petitioner

v.

MUNICIPALITY OF ANCHORAGE,

Respondent

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

The Petition poses the following questions for this Court's consideration:

1. Has Storrs raised a substantial federal question which warrants review by this Court?
2. Does due process require an employer to conduct an adversarial hearing prior to dismissal of an employee who is (a) subject to dismissal only for just cause; (b) subject to a collective bargaining agreement which provides for post-termination arbitration at the discretion of the union; and (c) able to invoke judicial review in the State courts at his own request if the union declines to grieve on his behalf?
3. If due process does require an employer to conduct an adversarial hearing prior to dismissal for such an employee, is reinstatement and back pay an appropriate remedy for the employer's failure to provide such a hearing when no actual injury has been proximately caused by that action?

TABLE OF AUTHORITIES

STATEMENT OF THE CASE[1]

This case arises from the undisputed fact that Storrs was dismissed from his job as a patrol officer with the Anchorage Police Department ("APD") pursuant to a citizen complaint that he had either coerced or permitted an intoxicated woman to perform oral sex for him while she was in his patrol car, in his official custody and while he was in uniform and on duty. The official purpose for her presence in the patrol car was her transport from her vehicle to her home by Storrs. App. D-3,4.

Upon consideration of the evidence collected by Police Lieutenant Kevin O'Leary following an exhaustive investigation, Police Chief Brian Porter decided that Storrs' conduct in this instance justified his dismissal from the police force. App. D-3,4. Among other things, the investigation yielded a lengthy statement from Storrs about his version of the events.

Storrs' employment with APD, including dismissal, was governed by a collective bargaining agreement ("contract") negotiated and executed by and between the Anchorage Police Department Employees Association ("APDEA"), on behalf of its membership, and Anchorage. Like all Anchorage police officers, Storrs was a member of APDEA, the recognized collective bargaining representative. App. D-2.

By contract, Storrs has expressly agreed to resolve disputes regarding dismissal in accordance with the procedures articulated in the collective bargaining agreement. App. D-2,6. The setting of Storrs' claim in the collective bargaining context is an important fact that should be kept in mind at all times in light of federal policy to encourage that practice. 29 U.S.C. § 151.

It is undisputed that no type of administrative adjudication *actually* ocurred for the purpose of reviewing the Police Chief's dismissal decision for Storrs. App. D. It is also un-

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[1] Anchorage objects to the statement of facts recited in the Petition to the extent that certain deposition excerpts and other factual assertions have not been properly presented to this Court by use of supporting materials.

disputed that the *opportunity* for such adjudication has been offered to Storrs and *refused* on two separate occasions. First, the collective bargaining agreement provides for grievances to be resolved by means of binding arbitration, should APDEA demand it on behalf of its member. APDEA declined to pursue Storrs' grievance. App. D-6.

Second, following APDEA's determination that Storrs' grievance lacked merit, Storrs filed this action. App. D-6. After all other issues had been resolved in Anchorage's favor by summary judgment, Storrs declined the trial offered to him for the purpose of testing the just cause upon which the dismissal decision rested. Instead, Storrs agreed that all issues between Anchorage and Storrs had been resolved in favor of Anchorage. App. C-2,D-5.

At this time, the merits of the dismissal decision remain unchallenged. Thus, the Court is bound to review the procedural claim raised on appeal with the understanding that it was reasonable for Chief Porter to conclude that Storrs engaged in the sexual activities alleged by the complaining citizen and that such misconduct justified his dismissal.

PROCEEDINGS BELOW

The State trial court granted summary judgment on the due process claim in favor of Anchorage by decision of January 31, 1984. Following rebriefing of that issue, the trial court again entered summary judgment in favor of Anchorage on November 21, 1984. On January 10, 1985 an order of final judgment was entered in favor of Anchorage at Storrs' request. All of these orders are reproduced as appendices here. App. A,B,C.

SUMMARY OF ARGUMENT

Relying upon the reasoning of the separate concurring opinions of Justices Brennan and Marshall in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), Storrs has asked this Court to reverse the majority opinion rendered in that case. Storrs seeks a finding that due process inflexibly requires an employer to conduct

a pre-termination adversarial hearing before dismissing an employee who can only be discharged for just cause.

In the course of deciding that the procedures applied to Storrs' dismissal were constitutionally adequate, the Alaska Supreme Court directly addressed application of federal due process, as stated in *Loudermill*. While that action may implicate a federal question, it is one of insufficient importance to justify exercise of this Court's discretion to review it because *Loudermill* squarely supports the State court's decision.

Storrs argues that the post-termination procedures offered to him, in the form of arbitration at the request of his union or judicial review at his own expense, are both inadequate under due process principles. First, Storrs argues that any post-termination procedure for review is inadequate. *Loudermill* unequivocally rejects that approach. Second, Storrs argues that if post-termination review is permissible, the opportunities for hearing available to him in this case were unduly delayed, thereby rendering them unacceptable. That argument fails, too, because Storrs has contractually agreed to delegate the power to call for arbitration to his union and because Storrs, himself, failed to ask for a prompt hearing, or any hearing at all, before a State trial judge.

Although Storrs has listed the remedy issue as one of the questions presented by his Petition, no argument to that end has been offered in the Petition. *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) and its progeny, however, demonstrate that a procedural due process violation alone does not justify an award of money damage or reinstatement of an employee to a job from which he was dismissed with just cause.

REASONS TO DENY THE PETITION

I. Introduction.

Two issues are presented by the Petition:

1. Was Storrs afforded procedural due process in connection with his dismissal?

2. If procedural due process was deficient, what is the proper remedy?

Storrs asserts that the Due Process Clause of the United States Constitution guarantees him a pre-termination adjudication[2] at which time he may test the merits of his dismissal under the just cause standard stated in the contract. No other procedure is adequate. Absent such an opportunity, Storrs argues that his due process interest has been irremediably injured so that reinstatement to his former position as a police officer with full backpay is the only remedy. That this approach necessarily precludes any consideration of the merits of the dismissal and provides a windfall recovery to Storrs does not appear to be of concern to him.

Removal of unfit police officers is of great concern to Anchorage, as is accommodation of the constitutional interests of its employees. Storrs' dismissal was accomplished in accordance with the contract and those procedures are lawful under the fluid due process standard, as adjusted to fit that factual setting. Storrs' analysis is flawed because it misconstrues the case law and ignores the particular facts of his case.

II. Due process does not require an adjudication of the dismissal decision before it is implemented.

Storrs' property interest at stake is defined in the employment contract. Due process principles apply only to a constitutionally recognized property or liberty interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the con-

[2] Storrs consistently uses the term "due process hearing" throughout the Petition to indicate a pre-termination adversarial adjudication with the attendant elements of cross-examination, an impartial decisionmaker and opportunity to present and rebut evidence.

> stitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972).

The precise nature of a particular property interest is determined by the source of the entitlement claimed by the individual, whether it be a legislative enactment or a contract. *Board of Regents v. Roth*, 408 U.S. 564, 577 92 S.Ct. 2701, 33 L.Ed.2d 548, 561 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 2077-2078, 48 L.Ed.2d 684 (1976).

Storrs' property interest in his job is created by the collective bargaining agreement which provides that an employee will not be dismissed absent "cause" and provides for adjudicatory review of a dismissal only *after* it is implemented. App. D-5.

The mere existence of a property interest, however, does not dispose of the question as to what process is due to protect that interest. The due process clause, alone, does not delineate the nature of the process due in every particular setting. Application of the due process standard is reserved to this Court and has, in fact, been articulated in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Storrs posits an independent, absolute constitutional right to a full adjudicatory hearing *before* the effective date of dismissal that overrides a negotiated contract procedure to the contrary. Storrs supplies absolutely no persuasive legal authority to support his position. Indeed, the law leads to the opposite conclusion. It cannot be reasonably argued that due process is the rigid standard Storrs suggests:

> [W]hat is unfair in one situation may be fair in another.... The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed,... the balance of hurt complained of and good accomplished

> — these are some of the considerations that must enter into the judicial judgment. (Citations omitted.)

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163, 71 S.Ct. 624, 644, 95 L.Ed. 817, 849 (1951).

Storrs' reliance upon *Joint Anti-Fascist Refugee Commission v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed.2d 817 (1951) and *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) to support his claim that due process always requires an adversarial hearing before deprivation is misplaced. While those cases deal, generally, with timing of certain due process procedures, it is clear that the subsequent case of *Loudermill, supra* articulates the specific due process standard to be applied to the dismissal of an employee who can only be discharged for cause.[3]

It is undisputed that no pre-termination adversarial hearing was offered or conducted to test the merits of the decision to dismiss Storrs. For that reason, Storrs' attempts to sh w that the criminal investigation of his conduct, the union review of Storr's grievance and the meeting with Chief Porter on the day of his dismissal do not rise to the level of an adversary hearing are irrelevant to this Court's consideration of the Petition.

In *Cleveland Board of Education v. Loudermill, supra*, this Court outlined in detail the requirements of due process prior to imposition of discipline outside the collective bargaining context on an employee who can only be dismissed for cause. Storrs interpretation of that case is unreasonable. That case clearly holds that an employee like Storrs has no absolute right to a full blown adjudicatory hearing prior to imposition of discipline: position of discipline:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The

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[3] Although his employment was not subject to a collective bargaining agreement, Loudermill is described as a "classified civil servant"... who could be "terminated only for cause...", *Loudermill* 84 L.Ed.2d at 499, as is the case with Storrs.

> opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement [citation omitted]. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [citations omitted]. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Loudermill, supra, 84 L.Ed.2d at 506,105 S.Ct. at 1495.

The purpose of the pre-disciplinary procedure required by due process is *not* to finally review the disciplinary decision before it is implemented, but rather to allow the employee an opportunity to present his side of the case at a time when the discretion of the decisionmaker can still be invoked and an erroneous decision avoided:

> Here, the pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action [citations omitted].

Loudermill, supra, 84 L.Ed.2d at 506.

The *Loudermill* requirements of due process for a pre-termination opportunity to be heard were met in Storrs' case:

1. Storrs was informed of the charge stated against him. App. D-4.
2. Storrs gave his side of the story, including a response to the evidence against him. App. D-4.
3. Chief Porter had the benefit of Storrs' side of the story before he reached a decision to impose discipline. App. D-4.

Under *Loudermill,* due process permits the opportunity for final adjudication of a dismissal decision to follow imposi-

tion of that discipline when the pre-termination procedures outlined above have been used. *Loudermill, supra,* 84 L.Ed.2d at 506. Here, the arbitration clause of the contract offered that opportunity immediately at the option of Storrs' union and Alaska law offered judicial review in the absence of arbitration. The existence of these two distinct opportunities for prompt post-termination review of the dismissal coupled with the pre-termination procedures actually applied to Storrs comply with the minimum due process standard articulated by this Court. *Loudermill, supra,* 84 L.Ed.2d at 506-507.

Storrs waived his right to obtain post-termination review of the dismissal. First, Storr delegated the decision to use the contract arbitration procedure to his union. App. D-2. Then, Storrs filed a lawsuit pertaining to his dismissal, but *never* asked for a post-termination hearing to review the merits of that dismissal. App. C-2, D-2,7. Under these circumstances, Storrs' argument regarding the length of time which elapsed between the dismissal and the trial date is simply irrelevant to the questions raised by the Petition.

III. The only remedy for a procedural due process violation is an appropriate hearing.

Among the five questions presented for review by the Petition, this one has not been addressed anywhere in the text of Storrs' discussion of the reasons why the Petition should be granted. The absence of any argument to that effect demonstrates that this issue is not one which demands review by this Court. It is well established that the remedy for a solely procedural violation of due process takes the form of an appropriate hearing. Backpay and reinstatement are available *only* if the employee demonstrates that the dismissal was unjustified. Other damages may be recoverable if the employee shows that a procedural due process violation proximately caused him actual injury. The record is devoid of any such showing by Storrs. Thus, even if due process was violated, damages and reinstatement are not an appropriate remedy.

In *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), this Court rejected a damage claim solely for a procedural due process violation. *Carey* concerned students

contesting suspensions. However, the Court explicitly recognized the application of its decision to the public employment context by its implicit disapproval of four circuit court cases which had awarded backpay solely for a due process violation until the time an adjudicatory hearing was held or the time the dismissal decision was affirmed. The United States Supreme Court summarized the issue:

> In this case, the Court of Appeals held that if petitioners can prove on remand that "[respondents] would have been suspended even if a proper hearing had been held, " 545 F.2d at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspension. (Citations omitted.) The court suggested that in such circumstances, an award of damages for injuries caused by the suspension would constitute a windfall, rather than compensation, to respondents. (Citations omitted.) We do not understand the parties to disagree with this conclusion. Nor do we.

Carey v. Piphus, 435 U.S. 247, 260-261, 98 S.Ct. 1042, 1050, 55 L.Ed.2d, 252, 262-263, (1978), [footnote omitted].

Courts following *Carey* have uniformly held or stated that a plaintiff may not collect backpay when there is only a procedural due process violation that is curable by a post-termination adjudication. *See, e.g., Wilson v. Taylor,* 658 F.2d 1021, 1032-1034 (5th Cir. 1981), and cases cited therein at 1034; *Vanelli v. Reynolds School District No. 7,* 667 F.2d 773 (9th Cir. 1982); and *County of Monroe, Florida v. U.S. Department of Labor,* 690 F.2d 1359, 1362 (11th Cir. 1982). All of the harm of which Storrs complains flows *not* from the dismissal procedures, but from the dismissal itself. To recover, he must successfully challenge the just cause finding; yet, he has refused to do so.

The discussion in *County of Monroe* is particularly enlightening:

> *Carey v. Piphus* is controlling here. When Mr.

> McClung's hearing finally took place, his termination was found to have been for good cause. The Administrative Law Judge stated that "it is likely that even if the correct procedures had been followed the Complainant would have been terminated." So while Mr. McClung has been deprived of his procedural rights, he has lost nothing because of it. He would have been terminated even if all procedures and regulations had been followed.
>
> . . . .
>
> When, as here, the Complainant's substantive rights have not been violated, the procedural rights have no independent educational value to the Complainant. Only if some actual loss flows from the loss of procedural due process may he be compensated.
>
> [T]he purpose of the remedy of back pay is to make the aggrieved party whole. It is unclear to us how a complainant who was properly discharged in a procedurally imperfect way is made whole by the payment of a year's wages for which he did not work. There is little logical correlation between the award and the loss. The payment of back pay here would be a windfall, not a make-whole compensation.
>
> . . . .
>
> To award back pay in this case would be to allow the procedural tail to wag the substantive dog.
>
> . . . .
>
> For a party to recover more than nominal damages for a deprivation of procedural due process, he must show actual compensable injury. The injury caused by the justified termination is not compensable in the form of back pay. *Carey v. Piphus, supra; Wilson v. Taylor, supra; Leje v. R.E. Thomason General Hospital,* 665 F.2d 724 (5th Cir. 1982); *City of Boston v. Secretary of Labor,* 631 F.2d 156 (1st Cir. 1980).

Monroe County, Florida, supra. at 1362-1363

CONCLUSION

Contrary to Storrs' assertion, this Court has squarely addressed the issue presented by this Petition in its recent decision in *Loudermill*. No valid reasons have been presented to support Storrs' suggestion that this Court abandon its previous decision. While it is true that Loudermill did not seek relief in the form of a mandatory, adversarial pre-termination hearing, this Court held that such a procedure was not required for an employee like him. The *Loudermill* decision has resolved both the timing and the nature of procedures which should accompany dismissal of an employee, like Storrs, who can only be dismissed for just cause. That Storrs' claim arises in the context of a collective bargaining agreement makes application of the *Loudermill* Standard even more compelling here. Thus, the Petition has failed to raise any substantial or important federal question and should be denied.

Dated at Anchorage, Alaska this _____ day of November, 1986.

Julie Garfield
Assistant Municipal Attorney
Attorney for Respondent

APPENDICES

APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

JOHN STORRS, *Plaintiff*	)
VS.	)
MUNICIPALITY OF ANCHORAGE, a municipal corporation, and ANCHORAGE POLICE DEPARTMENT EMPLOYEES' ASSOCIATION, *Defendants*	)

Case No. 3 AN 83-4829 Ci.

ORDER

This court having reviewed Anchorage's Motion for Partial Summary Judgment and the remaining parties' responses thereto,

IT IS HEREBY ORDERED that Plaintiff has not suffered a due process violation under either the State of Alaska or United States Constitution by virtue of the fact that this court shall review the decision of his employer to terminate his employment pursuant to *Casey v. City of Fairbanks*, Alaska Sup.Ct. Op. 2740 (October, 1983), in lieu of review by an arbitrator pursuant to Article V (2) of the applicable collective bargaining agreement. The Motion is GRANTED.

DATED this 31 day of January, 1983.

KARL JOHNSTONE
Superior Court Judge

Handwritten Addition:

Further ordered that P may not recover punitive damages against the association. KSJ 1/31/84

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOHN W. STORRS, *Plaintiff*	)
VS.	)
MUNICIPALITY OF ANCHORAGE, a municipal corporation, and ANCHORAGE POLICE DEPARTMENT EMPLOYEES' ASSOCIATION, *Defendants*	)

Case No. 3AN-83-4829 Civil

ORDER

Plaintiff has moved for partial summary judgment, asking that judgment be entered in plaintiff's favor establishing as a matter of law that plaintiff was not afforded due process because of failure of Defendant Municipality of Anchorage in giving plaintiff a pre-termination hearing prior to his discharge. The court earlier denied plaintiff's motion for summary judgment and has considered the additional briefing and the record developed since the decision. This order shall serve as a clarification of the earlier order, and shall constitute the law of this case.

The Court orders that plaintiff's motion for summary judgment is DENIED, and finds as undisputed facts; that plaintiff was a police officer with the Municipality of Anchorage at the time of his discharge; was represented by a labor organization; that said labor organization had a collective bargaining agreement with the Municipality of Anchorage covering plaintiff's wages, hours and working conditions, and that within said agreement was a provision allowing for the processing of grievance and arbitration of a discharge of plaintiff. The

Court concludes, based on these undisputed facts, that plaintiff did not have a constitutional right to a pre-termination hearing. Plaintiff's claims, which were not pursued by his labor organization, are presently set for trial in mid-January, 1985. The primary issue between plaintiff and Defendant Municipality of Anchorage at the trial will be whether Defendant Municipality of Anchorage breached the collective bargaining agreement wherein plaintiff could not be discharged except for just cause.

IT IS FURTHER ORDERED that based on plaintiff's statements on the record on November 15, 1984, motions by the Municipality of Anchorage pertaining to conspiracy and defamation are GRANTED.

IT IS FURTHER ORDERED that issues concerning plaintiff's character are reserved for ruling at such time as they are offered at trial. Defendants shall follow all applicable rules of evidence pertaining to notice to the court prior to introduction of said evidence.

IT IS FURTHER ORDERED that Defendant Municipality of Anchorage's motion pertaining to the admissibility of a polygraph as evidence of just cause for plaintiff's discharge is PARTIALLY GRANTED. The Court has concluded that the use of the polygraph in this case, limited to the facts of this case only, is not, per se, inadmissible. Provided a proper foundation is laid which tends to show the reliability of the polygraph, and provided that after reviewing the other evidence presented by a defendant to justify its discharge of plaintiff, the Court is satisified that the introduction of the polygraph would not unnecessarily confuse the issues, nor would any unfair prejudicial effect outweigh its probative value, and subject to the requirements of the other rules of evidence, said polygraph may be admissible.

DATED this 21 day of November, 1984, at Anchorage, Alaska.

KARL S. JOHNSTONE
Superior Court Judge

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

JOHN W. STORRS, *Plaintiff,*	)
VS.	)
MUNICIPALITY OF ANCHORAGE, a municipal corporation, and ANCHORAGE POLICE DEPARTMENT EMPLOYEES' ASSOCIATION, *Defendants*	)

Case No. 3AN-83-4829 CI

FINAL JUDGMENT

Based upon proceedings taken in open court on December 24, 1984, and prior orders of this Court in response to motions for summary judgment, final judgment is hereby entered in favor of Anchorage and against Plaintiff, JOHN W. STORRS, on all issues raised in the Complaint against Anchorage as follows:

FINDINGS OF FACT

1. Summary judgment has been granted in favor of Anchorage and against Storrs on the following issues:

A. Punitive damages
B. Defamation
C. Conspiracy
D. Intentional and Negligent Emotional Distress
E. Due Process Requirements for Termination Hearing

2. Storrs has conceded that defamation, conspiracy, intentional and negligent emotional distress claims are dependent upon the due process claim and cannot be maintained

in absence of a decision on the due process issue favorable to Storrs.

3. Storrs asserts that he has not claimed in this suit that Anchorage has breached its employment contract with Storrs by dismissing him without just cause. Further, Storrs refuses to amend his Complaint and proceed to trial on that issue on January 14, 1985. Storrs' has claimed he was impermissibly terminated because he was not given a due process termination hearing.

4. Anchorage asserts that the pleadings can be fairly construed to frame the breach of contract claim, that no amendment is necessary, and that it is ready, willing and able to proceed to trial of that issue on January 14, 1985.

5. Anchorage asserts that the breach of contract claim cannot be the subject of a future lawsuit as such action would constitute impermissible claim splitting. Storrs disagrees with that assertion.

CONCLUSIONS OF LAW

1. All matters pleaded by Storrs against Anchorage have been resolved in favor of Anchorage. Those matters asserted in the Complaint against Anchorage and not resolved by summary judgment, if any, are hereby dismissed with prejudice.

2. The court has not ruled on the merits of the parties' respective assertions about the ability of Storrs to reach the merits of the breach of contract claim in a subsequent suit. That matter is not ripe for decision at this time.

3. The court has previously determined that Storrs is not constitutionally entitled to a pretermination hearing but that the trial in this case would allow Storrs to litigate the issue of whether Anchorage breached the collective bargaining agreement wherein Storrs could not be discharged except for just cause. At the December 24, 1984 hearing, Storrs acknowledged through counsel that such is the court's ruling, but declined to amend his Complaint and declined to proceed to trial on this issue January 14, 1985, without amendment. Entry of final judgment is appropriate under the circumstances recited herein.

ORDER OF FINAL JUDGMENT

Based upon the Findings of Fact and Conclusions of Law recited above and which are made a part of this Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment is entered in favor of Anchorage on all claims framed by the Complaint and Answer.

2. Anchorage's Cross-claim against APDEA is dismissed without prejudice.

3. A motion to dismiss by APDEA on Plaintiff's duty of fair representation claim was ripe for determination, but the court would not rule upon it at the time that the court granted a stay. Consequently, the trial court proceedings be tween APDEA and Storrs are stayed pending resolution of the appeal from this case between Anchorage and Storrs.

4. Pursuant to Civil Rule 54 (b), the court finds that there is no just reason to delay entry of final judgment in favor of Anchorage and against Storrs so that an appeal may be taken from this decision.

5. The trial date of January 14, 1985 is vacated.

6. Storrs shall withdraw the pending Petition for Review if he has not already done so.

7. Anchorage may move for attorney fees and costs in accordance with the Civil Rules of Procedure and any award thereof shall be addressed in subsequent orders of this court.

DATED at Anchorage, Alaska this 10 day of January, 1985.

KARL S. JOHNSTONE
Superior Court Judge

APPENDIX D

John W. Storrs, Appellant,

v.

MUNICIPALITY OF ANCHORAGE,
a municipal corporation, Appellee.

No. S-863

Supreme Court of Alaska.

July 11, 1986

Rehearing Granted in Part and
Opinion Amended July 29, 1986

Discharged police officer filed suit against municipality for reinstatement and back pay, arguing he was deprived of due process because he did not receive a pretermination hearing. The Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., entered summary judgment for the municipality, and officer appealed. The Supreme Court, Moore, J., held that: (1) pretermination procedure followed by municipality comported with minimum federal due process requirements; (2) a post-termination adversarial hearing may satisfy requirements of Alaska's due process clause when a collective bargaining agreement waives the constitutionally mandated pretermination adversarial hearing; and (3) officer was not entitled to back pay from date of discharge to date of post-termination trial.

Affirmed.

James T. Robinson, David A. Devine, Smith Robinson, Gruening & Brecht, Anchorage, for appellant.

Jerry Wertzbaugher, Municipal Atty., Julie Garfield, Asst. Municipal Atty., Anchorage, for appellee.

Before RABINOWITZ, C.J., and BURKE MATTHEWS, COMPTON AND MOORE, J.J.

OPINION

MOORE, Justice.

This appeal raises the question whether a collective bargaining agreement can alter the constitutional rights of covered employees to provide for post-termination review, rather than pretermination review, of a discharge and, if so, whether a discharged employee is entitled to back pay between his dismissal and eventual post-termination review. The superior court found the officer received all process due and the officer appealed. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

John W. Storrs was a career police officer with the Municipality of Anchorage Police Department (Municipality). The Municipality claims that, while on duty, Storrs engaged in sexual activity with a woman he was driving home. Storrs denied the allegation. Following an exhaustive internal investigation, Police Chief Brian Porter fired Storrs.

Storrs is a member of a collective bargaining unit represented by the Anchorage Police Department Employees Association (APDEA). Under the collective bargaining agreement, a police officer may only be dismissed for just cause. Officers are entitled to two week notice or two weeks pay prior to discharge. The contract provides for arbitration of grievances only upon demand of APDEA. APDEA declined to arbitrate Storrs' dismissal.

Storrs filed suit in superior court against the Municipality for reinstatement and back pay, arguing he was deprived of due process because he did not receive a pretermination hearing. Judge Karl S. Johnstone entered summary judgment for the Municipality, concluding that Storrs was not entitled to a pretermination hearing but that he had the right to a trial on his claim that he was terminated without just cause.[1] Storrs appealed.

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[1] Although a trial was scheduled for January 1985, Storrs declined the opportunity to present his case in superior court.

II. FEDERAL DUE PROCESS RIGHTS

A. Pretermination Hearing

Storrs argues that he was deprived of a constitutionally protected interest in his continued employment without due process of law because he did not receive a pretermination hearing. The Municipality contends that Storrs was not deprived of due process.

[1,2] Public employees, other than those serving "at will," have a sufficient property interest in continued employment to warrant due process protection prior to termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. — , —, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494, 501 (1985). The collective bargaining agreement provides that Anchorage police officers may be dismissed only for just cause. Therefore, Storrs has a property interest in his continued employment; he may not be deprived of his job without due process of law. The question remains what process is due?

[3,4] The root of due process is the right to a hearing *before* a deprivation of property. *Loudermill*, 470 U.S. at —, 105 S.Ct. at 1493, 84 L.Ed.2d at 503. The nature of the employee's pretermination rights varies, depending in part on the nature of subsequent proceedings available. *Loudermill*, 470 U.S. at —, 105 S.Ct. at 1495 84 L.Ed.2d 506. The procedure should provide an initial check against a mistaken decision by the employer, ensuring that there are reasonable grounds to believe the allegations against the employee are true. *Id.* At a minimum, the employee must receive oral or written notice of the proposed discharge, an explanation of the employer's evidence and an opportunity to present his position. *Id.* Storrs argues that he was deprived of due process because the Municipality did not explain its evidence nor provide a meaningful opportunity to respond.

[5] We conclude that the pretermination procedure followed by the Municipality comported with minimum federal due process requirements. The Municipality undertook an investigation on November 17 after receiving the complaint against Storrs. The investigation officers took a statement from the woman and examined the scene of the reported incident.

taking photographs and casts of tire tracks. They measured time and distance of various routes from Storrs' point of origin to the woman's residence. The woman submitted to a polygraph examination. Other officers with knowledge of the events in question were interviewed.

On November 24, the investigating lieutenant interviewed Storrs about the incident. Also present were Storrs' shop steward and police captain. The lieutenant informed Storrs he was conducting a criminal investigation and advised Storrs of his constitutional rights. Storrs agreed to a recorded interview and gave his version of the evening's events. Storrs indicated that he did not know exactly where the woman's house was and that, although she made sexual advances toward him, no sexual contact occurred.

On November 26, Storrs voluntarily submitted to a polygraph examination. Storrs again gave his version of the facts. The state trooper who administered the test told Storrs that he appeared to be lying about certain material facts and urged Storrs to explain what really happened. The trooper informed Storrs about the contents of the woman's statements and that her allegations were supported by mileage and time measurements, the police department radio log, and tire tracks and footprints found at the scence. Storrs was also informed that the statement of another police officer indicated Storrs knew the location of a certain street and therefore Storrs' statement that he go lost on the way was less likely to be true. The trooper again urged Storrs to tell the truth. Storrs maintained that his original version was correct.

On December 6 Police Chief Porter, Storrs and Storrs' shop steward met. Porter again gave Storrs the opportunity to explain any of the evidence gathered, but Storrs merely repeated his blanket denial and did not offer any further information. At the conclusion of the interview, Porter fired Storrs.

We conclude that Storrs received notice, an explanation of the evidence against him and a sufficient opportunity to respond during the course of the investigation. The pretermination requirements of federal due process were therefore satisfied in this case.

B. Post-termination Hearing

[6] When minimal pretermination procedures are followed, federal law entitles a public employee to a formal evidentiary post-termination hearing within a reasonable time. *Kelly v. Smith*, 764 F.2d 1412, 1415 (11th Cir. 1985); *Brasslett v. Cota*, 761 F.2d 827, 836 (1st Cir. 1985); *DeSarno v. Department of Commerce*,761 F.2d 657, 660 (D.C.Cir. 1985). The collective bargaining agreement provides for prompt review of grievances and binding arbitration of unresolved disputes. However, in the instant case APDEA refused to press Storrs' claim hence no post-termination hearing occurred. In Alaska, Storrs' remedy lies in the courts; he may sue the Municipality for breach of contract. *Casey v. City of Fairbanks*, 670 P.2d 1113, 1138 (Alaska 1983).

[7] Storrs was dismissed in December 1982. Trial was scheduled for January 1985. The question is whether, under the circumstances presented here, this delay is so unreasonable as to violate Storrs' due process rights.

Storrs did not file a complaint until June 1983, six months after the dismissal. The complaint did not request an immediate judicial hearing. In November 1983, the Municipality moved for partial summary judgment, claiming that Storrs' remedy was a judicial determination of the merits of the termination decision. Instead of joining in this suggestion and demanding an immediate trial, Storrs opposed it. Judge Johnstone granted partial summary judgment and set trial for January 1985. Storrs at no time requested an earlier trial date; instead he requested the court to enter final judgment against him so that he could appeal.

Under these specific circumstances, we cannot conclude that Storrs' federal due process rights were violated by the delay. The fact is that Storrs never requested a prompt post-termination hearing. When a post-termination hearing was offered, he refused it.

III. STATE DUE PROCESS RIGHTS

A. Pretermination Hearing

[8] Like the federal constitution, the Alaska constitution affords pretermination due process protection to public employees who may only be terminated for just cause. *McMillan v. Anchorage Community Hospital*, 646 P.2d 857, 864 (Alaska 1982). Again we must consider the extent of the process due.

[9] In *Nichols v. Eckert*, 504 P.2d 1359, 1365 (Alaska 1973), the court ruled that a post-termination hearing was constitutionally deficient because the discharged employee was not permitted to call witnesses on her behalf. Although a full judicial hearing is not required, the employee must be allowed to present a defense by testimonial and other evidence. *Id.* Three justices concurred in an opinion concluding that, absent extraordinary circumstances, the hearing should occur *prior* to termination. *Id.* at 1366. We therefore conclude that a public employee ordinarily had the right to an adversarial hearing before he may be effectively dismissed.

[10] In limited circumstances, however, a collective bargaining agreement may alter the pretermination rights of covered employees. We hold that a post-termination adversarial hearing may satisfy the requirements of Alaska's Due Process Clause when a collective bargaining agreement waives the constitutionally mandated pretermination adversarial hearing. Such a substitution of a post-termination hearing for a pretermination hearing is permissable "so long as the negotiated agreement provides fair, reasonable, and efficacious procedures by which employer-employee disputes may be resolved," *Gorham v. City of Kansas City*, 590 P.2d 1051, 1058 (Kan. 1979). *Accord, Antinore v. State of New York*, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975), aff'd 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 268 (1976). Where, as here, a discharged employee can seek post-termination judicial review of his grievance, due process has not been offended.

B. Post-Termination Hearing

[11] The post-termination proceeding contemplated by the collective bargaining agreement did not take place in this case because the union declined to pursue the termination grievance. At that point Storrs had the right to a prompt and full post-termination hearing in the superior court. *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983). However, as we have previous-

ly explained, Storrs did not request a post-termination hearing and in fact refused one when it was offered. We therefore conclude that Storrs waived his right to a post-termination hearing by not requesting one. *See Graham v. State*, 633 P.2d 211, 216 (Alaska 1981).

IV. STORRS' RIGHT TO INTERIM WAGES

Storrs also argues that he is entitled to back pay from the date of discharge to the scheduled trial date. The Municipality contends that Storrs would have been entitled to reinstatement and back pay only if he had demonstrated at trial that his employment was terminated without just cause.

[12,13] When a constitutionally unlawful dismissal is cured by a post-termination hearing, the employee is entitled to be paid for the period between dismissal and the curative hearing. *Kenai Peninsula Borough Board of Education v. Brown*, 691 P.2d 1034, 1039 (Alaska 1984); *McMillan*, 646 P.2d at 867. However, in the instant case, Storrs received all process due, therefore his termination was constitutionally lawful. We therefore conclude that awarding Storrs two years of back pay under these circumstances would be an unwarranted extension of *Brown* and *McMillan*.

The decision of the superior court is AFFIRMED.